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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1829

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

vs.

MORGAN COY COMBS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Now comes WILLIAM L. CAHALAN, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward Reilly Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in the above-entitled cause on August 23, 1979, leave to appeal denied by the Michigan Supreme Court on March 17, 1980.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and is appended as Appendix A. The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 23, 1979. The Michigan Supreme Court denied Petitioner's application for leave to appeal on March 17, 1980. The jurisdiction of this court is invoked under 28 USC, Sec. 1257 (3).

QUESTION PRESENTED

IN ORDER TO ESTABLISH PROBABLE CAUSE TO ARREST, PARTICULARLY UNDER CIRCUMSTANCES WHERE PROMPT ACTION IS NECESSARY, MAY A POLICE OFFICER RELY ON INFORMATION GIVEN HIM BY AN ORDINARY CITIZEN WHO IS RELAYING INFORMATION FROM ANOTHER ORDINARY CITIZEN WHO OBSERVED THE EVENT IN QUESTION?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF FACTS

Respondent was charged and convicted of the unlawful possession of cocaine.

The preliminary examination transcript reveals that on October 12, 1976, Officer Thomas Goscinski, of the Redford Township Police Department, received a phone call from his police dispatcher, directing him to a bar on Telegraph Road, to investigate a complaint concerning two suspects in the bar (P.E., 1).*

Officer Goscinski entered the bar and spoke to Mr. Ericson, whom he knew to be the bar owner (P.E., 2). Mr. Ericson told the officer that one of his barmaids had seen the defendant and his female companion openly snorting what she believed to be cocaine while in the bar. Mr. Ericson pointed out Mr. Combs and the female to Officer Goscinski just as both suspects got up and exited through the front door (P.E., 9-10). The officer was unable to speak personally with the barmaid and followed the suspects, who got into a car and left the parking lot (P.E., 3). Officer Goscinski, with the assistance of a uniformed officer, stopped the defendant and discovered the cocaine on him (P.E., 4).

The officer did have an opportunity to speak with the barmaid after defendant's arrest (P.E., 10). The officer's testimony was substantially the same at trial, and the bar owner testified to receiving the information from a waitress and relaying it to the officer.

Respondent argued that the arresting officer lacked probable cause to arrest defendant, but the magistrate bound defendant over for trial (P.E., 12-17).

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*The letters "P.E." and accompanying numerals refer to page numbers in the preliminary examination transcript.

Respondent brought a motion to suppress, which was denied by the Hon. Michael L. Stacey, Judge of Wayne County Circuit Court.

On August 4, 1977, respondent appeared before the Hon. William Leo Cahalan for purposes of trial. Respondent waived his right to a jury trial in open court, and was ultimately convicted.

The Michigan Court of Appeals held the jury waiver to be defective, but also ordered suppression of the narcotics which formed the basis of the criminal charge, holding that the police lacked probable cause for respondent's arrest (see Appendix A).

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals held in this case that the cocaine was seized as "the result of a warrantless search without probable cause" because "the officer acted upon the information of an unknown person given to him secondhand by a person with whom he had very little previous contact" and because "the information was not corroborated and did not contain details that might have been self-verifying." Petitioner submits that this analysis fails to take into account the exigency of the circumstances which precluded the officers from speaking with the actual witness to the criminal activity; that it incorrectly denigrates the role of hearsay ("secondhand" information) in establishing probable cause; that it erroneously applies to ordinary citizens the principles of Draper v United States, 358 US 307 (1959); Aguilar v Texas, 378 US 108 (1964); and Spinelli v United States, 393 US 410 (1969); and that it fundamentally misperceives the nature of probable

cause. Because the Michigan Court of Appeals decision finds some support in case authority, and because this court has never authoritatively spoken on the question of probable cause and hearsay from ordinary citizens, a question is presented requiring plenary consideration by this court.

It must be remembered that probable cause does not mean absolute certainty; rather, the question is, viewing the facts and circumstances within the officer's knowledge as would a prudent person or a person of reasonable caution, and not a legal technician, would such a person be justified in believing that the suspect has committed, is committing, or is about to commit an offense. Michigan v DeFillippo, ____ US ____, 61 LEd 2d 343 (1979); Beck v Ohio, 379 US 89 (1964); Draper v United States, supra. When an ordinary citizen, here a businessman who has previously reported to the police the occurence of narcotics activity in his establishment, reports to the police that another ordinary citizen, an employee, has complained of observing the open use of narcotics, and points out the culprits as they are leaving, surely a reasonable and prudent person would be justified not only in believing this information, but in immediately acting on it by apprehending the defendants before they disappeared forever while the officers "verified" the information with the eyewitness to the criminal event. The Michigan Court of Appeals reached the opposite conclusion and required a higher standard than probable cause by confusing the purpose of Draper, Aguilar, and Spinelli. Petitioner submits that particularly where circumstances dictate immediate action, hearsay information from an ordinary citizen need be neither verified nor corroborated before officers may act.

It has become a commonplace that when police officers attempt to demonstrate probable cause based on information received from "informants" a two pronged test must be met: the officers must show a basis for believing the informant to be reliable, and

second, the officers must show that the informant's information is credible by detailing the underlying factual circumstances from which the informant drew his conclusions. Aguilar, Spinelli, supra. (But see Harris v United States, 403 US 573 (1971) where Justice Black declared that he would over-rule both Aguilar and Spinelli; Justice Blackmun stated that he would over-rule Spinelli; and Justices Black and Blackmun joined Chief Justice Burger in attaching reduced significance to the concept of reliability). Subsequent applications of the Aguilar/Spinelli standards have demonstrated that the requirements imposed in Aguilar and Spinelli were a response to a specific situation, that is, the use of "professional" confidential informants, who themselves are ordinarily criminally involved or disposed.

One of the first cases to distinguish ordinary citizens from professional informants was McCreary v Sigler, 406 F2d 1264, 1269 (CA 8, 1969), cert den, 395 US 984 (1969), which dealt with an unknown citizen:

> Probable cause for an arrest may exist where an unknown citizen makes complaints as a victim or eyewitness to a crime, where the underlying circumstances demonstrate his first-hand personal knowledge.

In the case at bar the waitress had personally observed the criminal conduct, and was not "unknown."

In United States v Bell, 457 F2d 1231, 1238-1239 (CA 5, 1972) the Fifth Circuit stated:

> It is now a well-settled and familiar concept, as enunciated by Aguilar and Spinelli, that supporting affidavits in an application for a search warrant must attest to the credibility of an informant and the reliability of his information . . . We have discovered no case that extends this requirement to the identified bystander or victim-eyewitness to a crime, and we now hold that no such requirement need be met.

See also United States v Rollins, 522 F2d 160, 164 (CA 2, 1975), cert den 424 US 918 (1976); United States v Banks, 539 F2d 14, 17 (CA 9, 1976); People v Schulle, 51 Cal App 3d 309; 124 Cal Rptr 585 (1975).

There is, however, some authority supporting the position taken by the Michigan Court of Appeals. In George, Michigan Criminal Procedure, Sec 1.05 (B) (3) (d) it is stated that "A noncriminal observer who reports a crime, particularly not one of immediate violence, not affecting himself or herself personally, may not serve . . . to provide a probable cause belief supporting arrest." For this proposition the text cites Holbrook v United States, 406 F2d 44 (CA 10, 1969), where, though pre-Aguilar/Spinelli, the Tenth Circuit referred to an identified ordinary citizen as an "informant" and held that information he provided to the police could not supply probable cause because the citizen's identity and reliability "remained untested" and his information was "uncorroborated." But even if Holbrook is viewed as correct in a situation where the police have time to query the citizen-reporter further, it can have no application where the police must act immediately or never. When an officer sees a person running and being pursued by a person shouting "Stop, thief," surely he need not first interrogate the pursuer before apprehending the pursued.

In sum, officers may rely on hearsay to establish probable cause. Ker v California, 374 US 23 (1963). Where that hearsay is passed from an ordinary citizen who received it from an ordinary citizen who witnessed the criminal event, principles of reliability, credibility and corroboration have no application, particularly where the situation requires immediate action. To the extent that Holbrook v United States, supra holds to the contrary, it demonstrates a split, or at least a lack of cohesion, among the federal circuits. This court ought to render clear the law in this area.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner requests that plenary review be granted.

Respectfully submitted,

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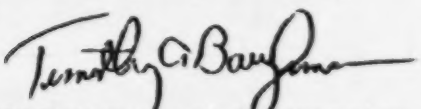
Prosecuting Attorney

EDWARD R. WILSON
Chief Appellate Attorney



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APPENDIX "A"

State of Michigan
Court of Appeals

People of the State of Michigan,
Plaintiff-Appellee

v No. 78-1745

MORGAN COY COMBS,
Defendant-Appellant

Before: Maher, P.J., Bronson and Moore*, JJ

Per Curiam

Defendant was convicted after a bench trial of possession of cocaine under the Controlled Substances Act, MCLA 335.341 (4)(b), MSA 18.1070(41). He was sentenced to a term of 1 to 2 years imprisonment and appeals by right.

A waitress in J's Beef and Spirits Bar in Redford Township reported to the manager that defendant and a female companion were using cocaine at their booth in the bar. The manager called the Redford Township Police, who dispatched an officer in plainclothes to the bar. He spoke momentarily with the manager but not with the waitress. As they spoke, the manager pointed out the defendant and his companion as they were leaving the bar. The officer followed them out and summoned a marked patrol unit that stopped the defendant's car on Telegraph Road. The first officer approached the car and noticed the woman reach into

* Former circuit judge, sitting on the Court of Appeals by assignment.

the glove compartment. Defendant got out of his car and the officer told him to empty his pockets. As defendant did this, the officer noticed a small, folded piece of paper. He seized the paper. It contained what later proved to be .091 grams of cocaine.

Defendant raises two issues on appeal, both of which are meritorious. First, defendant claims that the trial court did not follow the statutory procedure for the waiver of a jury trial. Second, defendant challenges the admission of the cocaine into evidence as the product of an illegal search and seizure.

A jury waiver is only effective if a defendant signs a written waiver and also waives his right in open court:

> " * * * Except in cases cognizable by a justice of the peace, such waiver and election by a defendant shall be in writing, signed by the defendant and filed in such cause and made part of the record thereof. * * *
>
> "Such waiver of trial by jury must be made in open court after the said defendant has been arraigned and has had opportunity to consult with counsel." MCLA 763.3; MSA 28.856.

Both parties agree that although the defendant orally waived his right to a jury in open court, he did not sign a written statement. It is argued that the colloquy between the defendant and the trial court established that his waiver was both voluntary and understanding. However, the statute requires the signing of a written waiver and this Court has consistently required strict adherence to its terms as a statute in derogation of a common law right. People v Word, 67 Mich App 663, 242 NW2d 471 (1976); People v Rimmer, 59 Mich App 645, 230 NW2d 170 (1975); People v Polhamus, 59 Mich App 609, 230 NW2d 171 (1975) lv

den, 394 Mich 819 (1975). The statutory language is explicit. Any other holding would detract from the legislative policy of requiring two affirmations of a defendant's intention to waive his right to a jury trial. We reverse.

Although defendant's first contention mandates reversal we reach his second issue to determine whether the cocaine may be introduced into evidence upon retrial. We conclude that it may not. The evidence was not seized as the result of a stop and frisk as in People v Tooks, 403 Mich 568, 271 NW2d 503 (1978), or Adams v Williams, 407 US 143, 92 S Ct 1921, 32 L Ed 2d 612 (1972), but as the result of a warrantless search without probable cause.

Here, the officer acted upon the information of an unknown person given to him secondhand by a person with whom he had very little previous contact. The information was not corroborated and did not contain the details that might have been self-verifying. See People v Orozco, 402 Mich 849, 261 NW2d 532 (1978); People v Walker, 401 Mich 572, 259 NW2d 1 (1977); People v Rodriguez, 83 Mich App 606, 269 NW2d 199 (1978).

Accordingly, we hold that the officer had no probable cause to search the defendant and therefore the fruit of that search must be excluded upon retrial.

Reversed and Remanded for further proceedings by the prosecutor.

APPENDIX "B"

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 17th day of March in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Mary S. Coleman, Chief Justice. Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant

v

SC: 63764
COA: 78-1745
LC: 76-638-073

MORGAN COY COMBS,
Defendant-Appellee

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of March in the year of our Lord one thousand nine hundred and eighty.

/s/ Jacqueline B. Moise
Deputy Clerk.